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COURT OF APPEALS  
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28814-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

PIERRE D. WEST, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

STEVEN J. TUCKER  
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Andrew J. Metts  
Deputy Prosecuting Attorney  
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial erred in denying defendant West's motion to amend the Information to reflect only those counts for which re-trial would not violate double jeopardy.
2. Retrial on Counts 5,7,13,14 and 15 violated West's constitutional rights to be free from double jeopardy.
3. Retrial on the original charges in Counts 3, 6 and 8 violated West's constitutional rights to be free from double jeopardy.
4. The trial court erred in instructing the jury it had to be unanimous to answer "no" to the special verdicts.
5. The trial court erred in accepting the jury's finding of acting with sexual motivation on Count 2.
6. Cumulative error deprived West of his right to fair trial.

II.

ISSUES PRESENTED

- A. SINCE ALL OF THE CONVICTIONS IN THE SECOND TRIAL WERE ALSO CONVICTIONS IN THE FIRST

TRIAL, WERE ANY DOUBLE JEOPARDY ISSUES  
RAISED BY THE SECOND TRIAL?

B. DID THE TRIAL COURT ERR IN THE LANGUAGE OF  
THE JURY INSTRUCTION FOR THE SPECIAL  
VERDICT ON COUNT II?

### III.

#### STATEMENT OF THE CASE

For the purposes of this appeal only, the State accepts the  
defendant's version of the Statement of the Case.

### IV.

#### ARGUMENT

A. THERE ARE NO DOUBLE JEOPARDY ISSUES  
IN THIS CASE.

The defendant raises a multitude of convoluted double jeopardy  
issues, in a case that does not involve double jeopardy.

Following a new trial instigated by a defense motion, the defendant  
was convicted on counts 1, 2, 3 (lesser), 8 (lesser), 11 and a special verdict  
on count 2. The defendant was convicted on each of these counts and  
special verdict in his first trial.

...[T]he double jeopardy clause “imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside” on any ground other than insufficiency of the evidence because the defendant's appeal is part of the initial or continuing jeopardy. *State v. Corrado*, 81 Wash.App. 640, 647-48, 915 P.2d 1121 (1996) (quoting *Tibbs v. Florida*, 457 U.S. 31, 40, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982))

*State v. Gamble*, 137 Wn. App. 892, 900, 155 P.3d 962 (2007).

See also, *State v. Daniels*, 160 Wn.2d 256, 156 P.3d 905 (2007);

*State v. Wright*, 131 Wn. App. 474, 127 P.3d 742 (2006).

“The defendant may be retried for the same offense, on the original indictment or under a new indictment.” *State v. Wright*, 165 Wn.2d 783, 792, 203 P.3d 1027 (2009).

Turning to this case, each of the convictions were part of continuing jeopardy from the first trial. Each count upon which the defendant was convicted was also a conviction (not an acquittal) in the first trial.

**B. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THEY MUST BE UNANIMOUS TO RETURN A “NOT GUILTY” FINDING ON THE SPECIAL VERDICT FOR COUNT II.**

A plain reading of the jury instruction for special verdicts indicates that the jury must be unanimous to return a “yes” verdict and also unanimous to return a “no” verdict. Inst. No. 54, CP 78. This instruction

is in contravention of *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010).

The State agrees that the special verdict should be stricken.

V.

CONCLUSION

For the reasons stated, the convictions (except for the special verdict) should be affirmed.

Dated this 3<sup>rd</sup> day of March, 2011.

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